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WHAT LAW GOVERNS THE REVOCATION OF A WILL. — A recent case presents a problem in conflicts of laws between two statutes of the same state. In *In re Cutler's Will*¹ the court admitted to probate a will executed² by the testatrix before her marriage. Her husband was domiciled in New York³ and, according to the New York law in force at the time,⁴ her marriage revoked her will. But at the time of her death, while she was still domiciled in New York, the law had been changed so that marriage for the purposes of this case was no longer a revocation.⁵ Which law should govern the alleged revocation of a will of personality?

At the outset it must be conceded that the problem is primarily a question of statutory construction. No constitutional provision is involved. There are no vested rights to be divested since a will is ambu-

¹ 186 N. Y. Supp. 271 (1921). For the facts of the case see RECENT CASES, p. 785, *infra*.

² The will was executed while the testatrix was domiciled in New Jersey. But New Jersey law could not govern the alleged revocation. *In re White's Will*, 183 N. Y. Supp. 129 (1920). See 6 CORN. L. Q. 212. There is no reason for dating the revocation back to the time of execution; the only doubt is whether it should not be dated forward to the law of the testator's domicile at death.

³ This fact is not clear from the opinion, but it appears in the record that not only the husband but the wife also was domiciled in New York prior to the marriage.

⁴ See 1909 N. Y. LAWS, c. 18, § 36.

⁵ See 1919 N. Y. LAWS, c. 293, § 1. The new statute substitutes a rebuttable presumption of revocation in place of the absolute revocation, thus placing unmarried men and women on the same footing. See 1909 N. Y. LAWS, c. 18, § 35.

latory; the contract clause is obviously inapplicable;⁶ the *ex post facto*⁷ prohibition applies only to criminal law;⁸ and there is no other limitation upon retrospective legislation either in the United States Constitution or in the constitutions of a very large majority of the states.⁹ The legislature is free to dictate what law should control.¹⁰ Ordinarily the statute in question contains a proviso that it is to apply only to wills executed after a fixed date in the future.¹¹ But there is nothing to prevent a retroactive statute framed to cover all wills and all alleged revocations in the past,¹² as long as rights have not already vested under a will by the death of the testator.¹³ Frequently, however, the statute is entirely ambiguous. The courts must then fall back upon the principle that every presumption is against a retrospective construction.¹⁴

Granting that the statute in force at the testator's death is not retrospective, the situation is the same as if the testator had changed his domicile after the alleged revocation and the two conflicting laws had been enacted by different states.¹⁵ The problem is then reduced to the question under which law the alleged revocation took effect. The answer must depend ultimately upon the dual nature of the will itself. During the life of the testator the will leads an inchoate existence as an important legal instrument, but it is only at the testator's death that it takes effect upon his property. Which of these two natures prevails and hence which law applies depends upon the point in issue. The legal operation of a will upon the testator's property is governed by the law in force at his death.¹⁶ Where the validity of its execution is in issue,

⁶ See UNITED STATES CONSTITUTION, Art. I, Sec. 10 (1).

⁷ See UNITED STATES CONSTITUTION, Art. I, Sec. 9 (3), Sec. 10 (1).

⁸ Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798).

⁹ Only a very few states have such a constitutional provision. See, for example, MO. CONSTITUTION, Art. II, Sec. 15; N. H. CONSTITUTION, Pt. I, Art. 23; TENN. CONSTITUTION, Art. I, Sec. 20.

¹⁰ Several cases can be explained entirely upon principles of statutory construction. See *Baptist Missionary Union v. Peck*, 10 Mich. 341 (1862); *Sherry v. Lozier*, 1 Bradf. (N. Y.) 437 (1851). For the freedom of the legislature in this respect see 1 REDFIELD, WILLS, 3 ed., § 30 a (18).

¹¹ See, for example, 7 Wm. IV & 1 Vict., c. 26, § 34. Where the conflict is between laws of different sovereigns, compare Lord Kingsdown's Act, 24 & 25 Vict., c. 114, § 3, "no will or other testamentary instrument shall be held to be revoked . . . by reason of any subsequent change of domicile. . . ." For a list of analogous American statutes see E. G. Lorenzen, "The Validity of Wills, Deeds, and Contracts as Regards Form in the Conflict of Laws," 20 YALE L. JOUR. 427, 435.

¹² Where the conflict is between laws of different sovereigns, a retroactive statute could not of course be given effect. But a statute might be framed to forbid probate of all wills executed before marriage.

¹³ Wilderman *v.* Mayor and City Council of Baltimore, 8 Md. 551 (1855); Giddings *v.* Turgeon, 58 Vt. 106, 4 Atl. 711 (1886). See SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 347.

¹⁴ See BLACK, CONSTITUTIONAL LAW, 3 ed., 754; SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 173.

¹⁵ This is on the assumption that there are no questions of conflicting public policy involved. Upon questions involving realty under the will the *lex rei sitae* must be substituted for the law of the testator's domicile. Carpenter *v.* Bell, 96 Tenn. 294 (1866).

¹⁶ *In re Kopmeier*, 113 Wis. 233, 89 N. W. 134 (1902); *Bishop v. Bishop*, 4 Hill (N. Y.), 138 (1843); *Price v. Taylor*, 28 Pa. St. 95 (1857); *Wilson v. Greer*, 151 Pac. 629 (Okla.) (1915).

the courts are divided, but probably the better view is that here too the law in force at his death controls.¹⁷ It might seem to follow that a revocation was governed by the same law. A revocation is simply a formal expression of intent that the will should not take effect at death. But this intent is accomplished by cutting the will off in its youth without waiting until it is full grown. A revocation takes immediate effect upon the inchoate existence of the will. This is brought out by the law on revival. If a revocation were purely ambulatory and took effect only upon death, its own revocation would surely be enough of itself to allow the original will to be probated as if nothing had happened. But in general the Wills Act¹⁸ in England and the American statutes in accord require a re-execution of the will,¹⁹ and the other line of legislation requires a clear intent to revive it by the terms of the revocation.²⁰ Doubtless this legislation is prompted by the same policy which favors a formal execution of the will in the first place. But the former type of statute shows that the revocation must have taken immediate effect upon the will and the latter type certainly points the same way. In fact the very term "revival" indicates that the will suffered before the testator's death. And authority is in accord. The distinct majority of cases hold that an alleged revocation is governed by the law in force at the time it was made.²¹

LIABILITY FOR ATTACK BY MAD DOG KNOWN TO BE VICIOUS.—It is well settled that at common law the owner of a domestic animal is not

¹⁷ For law at death: *Wakefield v. Phelps*, 37 N. H. 295 (1858); *Langley v. Langley*, 18 R. & 618, 30 Atl. 465 (1894); *Sutton v. Chenault*, 18 Ga. 1 (1855); *Lawrence v. Hebbard*, 1 Bradf. (N. Y.) 252 (1850). See 1 JARMAN, *WILLS*, 6 Am. ed., 332 n.; REDFIELD, *WILLS*, 3 ed., § 30 a (17) (18). Cf. *Moultrie v. Hunt*, 23 N. Y. 394 (1861). For law at date of execution: *Lane's Appeal*, 57 Conn. 182, 17 Atl. 926 (1889); *Packer v. Packer*, 179 Pa. St. 580, 36 Atl. 344 (1897); *Barker v. Hinton*, 62 W. Va. 639, 59 S. E. 614 (1907). See SCHOULER, *WILLS*, 3 ed., § 11.

Nothing turns on whether the law in force at death validates or invalidates the will.

¹⁸ See 7 W.M. IV & 1 VICT., c. 26, § 22.

¹⁹ For a list of these statutes see WARREN, *CASES ON WILLS*, 315 n.

²⁰ For a list of these statutes see WARREN, *CASES ON WILLS*, 320 n.

²¹ *Goodsell's Appeal*, 55 Conn. 171, 10 Atl. 557 (1887); *Swan v. Sayles*, 165 Mass. 177, 42 N. E. 570 (1896); *In re Tuller*, 79 Ill. 99 (1875). See *Smith v. Clemson*, 6 Houst. (Del.) 171 (1880).

The same rule applies where the conflict is between laws of different sovereigns. *In re Martin*, [1900] P. D. 211. See 14 HARV. L. REV. 379. See MINOR, *CONFLICTS*, § 149. *Contra*, Coburn's Will, 9 Misc. (N. Y.) 437, 30 N. Y. Supp. 383 (1894). The following two cases turn upon Lord Kingsdown's Act, note 11, *supra*:—*Goods of Reid*, L. R. 1 P. & D. 74 (1866); *In the Estate of Groos*, [1904] P. D. 269. But the language in the former case indicates that apart from the statute the law at death should govern, while the language in the latter favors the law at the date of the alleged revocation.

As far as the problem of conflicts goes it should make no difference whether the law in force at the time the revocation was made rendered it valid or not. If a revocation is a complete act, effective at once, it must stand or fall by the law in force at that time. And it is immaterial whether the revocation is by act, codicil, or operation of law. The distinction between a codicil and an actual tear for the purpose of conflicts of laws is only apparent. The reasoning above turns upon the effect rather than the superficial character of the revocation.